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October 1, 2007

BY HAND DELIVERY AND ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

FILED/ACCEPTED

OCT - 1 2007

Federal Communications Commission
Office of the Secretary

Re: In the Matter of Petitions of Qwest Corporation for Forbearance Pursuant
to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and
Seattle Metropolitan Statistical Areas, WC Docket No. 07-97
REDACTED - FOR PUBLIC INSPECTION

Dear Ms. Dortch:

On behalf of Covad Communications Group, NuVox Communications, and XO Communications, LLC (collectively "Commenters") enclosed for filing in the above-referenced proceeding are two copies of the redacted version of the Commenters' Reply Comments. A copy of these redacted Reply Comments is also being submitted via the Federal Communications Commission's Electronic Comment Filing System.

In accordance with paragraph 14 of the *Second Protective Order*, dated June 1, 2007 (DA 07-2293), one copy of the Reply Comments which contain Highly Confidential information is being submitted to your attention under separate cover letter. Two copies of the Highly Confidential Filing are also being submitted, by hand delivery, to Mr. Gary Remondino of the Wireline Competition Bureau.

Kindly date stamp the duplicate of this letter and return it to the courier.

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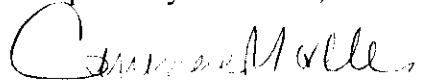
Ms. Marlene H. Dortch

October 1, 2007

Page 2

Please contact the undersigned at (202) 342-8531, if you have any questions about this letter.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Genevieve Morelli".

Genevieve Morelli

*Counsel to Covad Communications, Group,
NuVox Communications, and XO
Communications, LLC*

Enclosures

REDACTED – FOR PUBLIC INSPECTION

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petitions of Qwest Corporation for)	
Forbearance Pursuant to 47 U.S.C. § 160(c))	WC Docket No. 07-97
In the Denver, Minneapolis-St. Paul,)	
Phoenix, and Seattle Metropolitan)	
Statistical Areas)	

**REPLY COMMENTS OF COVAD COMMUNICATIONS GROUP, NUVOX
COMMUNICATIONS, AND XO COMMUNICATIONS, LLC**

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Dated: October 1, 2007

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**REPLY COMMENTS OF COVAD COMMUNICATIONS GROUP, NUVOX
COMMUNICATIONS, AND XO COMMUNICATIONS, LLC**

Covad Communications Group, NuVox Communications, and XO

Communications, LLC (hereinafter referred to as “Joint Commenters”), through counsel and pursuant to the Public Notice issued by the Federal Communications Commission (“FCC” or “Commission”) on July 6, 2007,¹ hereby provide their reply comments on the petitions filed by Qwest Corporation (“Qwest”) on April 27, 2007 seeking forbearance from certain of the Commission’s rules within four Metropolitan Statistical Areas (“MSAs”). Qwest seeks substantial deregulation, pursuant to Section 10 of the Communications Act of 1934, as amended (“Act”),² within the Denver, Minneapolis-St. Paul, Phoenix, and Seattle MSAs.³

¹ *Wireline Competition Bureau Grants Extension of Time to File Comments on Qwest’s Petitions for Forbearance in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Docket No. 07-97, Public Notice, DA 07-3042 (rel. Jul. 6, 2007).

² 47 U.S.C. § 160.

³ Qwest seeks forbearance from the loop and transport unbundling regulations contained in Sections 251(c)(3) and 271(c)(2)(B)(ii). Qwest also seeks forbearance from the dominant carrier tariff requirements set forth in Part 61 of the Commission’s rules; from price cap regulations set forth in Part 61 of the Commission’s rules; from the Computer III requirements, including Comparably Efficient Interconnection (“CEI”) and Open Network Architecture (“ONA”) requirements; and from dominant carrier requirements arising under Section 214 of the Act and Part 63 of the Commission’s rule concerning the process for acquiring lines, discontinuing services, making assignments or transfers of control. *See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §*

I. INTRODUCTION AND SUMMARY

The initial comments filed in this proceeding unanimously confirm that Qwest has exceeded the bounds of reason in its quest for forbearance. In total disregard of the standards of proof developed in an earlier forbearance proceeding in which it was the petitioning party, Qwest has failed to put forth even the pretext of a supportable factual case for its forbearance requests and the limited information Qwest has offered is irrelevant or of highly dubious value. This indifference to its obligations as the party seeking forbearance should not be tolerated by the Commission. Continuing to consider Qwest's Petitions would only waste Commission and industry time and resources. It is highly appropriate for the Commission to dismiss Qwest's Petitions immediately.

The initial comments verify that there is absolutely no support for the deregulation being sought by Qwest for the Denver, Minneapolis-St. Paul, Phoenix, and Seattle MSAs. Well over a dozen entities – including cable companies, state governmental entities, consumer groups, large and small users, and competitors – filed comments showing that Qwest has not met the statutory requirements for forbearance and that a grant of forbearance would result in significant negative impacts on consumers in the four important MSAs at issue.

As a threshold matter, numerous commenters emphasized that Qwest's Petitions should be dismissed because Qwest has failed to provide the market-specific data necessary for

160(c) in the Denver, Colorado Metropolitan Statistical Area, WC Docket No. 07-97 (filed Apr. 27, 2007), at 3-4 ("Qwest Petition – Denver"); Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Minneapolis-St. Paul, Minnesota Metropolitan Statistical Area, WC Docket No. 07-97 (filed Apr. 27, 2007), at 3-4 ("Qwest Petition – Minneapolis"); Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, WC Docket No. 07-97 (filed Apr. 27, 2007), at 3-4 ("Qwest Petition – Phoenix"); Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Seattle, Washington Metropolitan Statistical Area, WC Docket No. 07-97 (filed Apr. 27, 2007), at 3-4 ("Qwest Petition – Seattle").

the Commission to perform a meaningful forbearance analysis. Comcast Corporation (“Comcast”) summarized the commenters’ concerns when it stated, “Qwest obscures its continued dominance of both the residential and business markets by failing to provide competitive data at the wire center level – as required by the *Omaha Order* and more recent forbearance decisions.”⁴ Commenter after commenter explained that the limited data produced by Qwest fails to demonstrate the presence of significant facilities-based competition in any of the four MSAs, as required by Section 10.⁵ Moreover, the limited information Qwest did produce was criticized as incomplete and inflating the extent of competition Qwest faces. In the words of the Ad Hoc Telecommunications Users Committee (“Ad Hoc”), “The evidence of competition that Qwest proffers is not only superficial and anecdotal but in fact compels the conclusion that Qwest maintains overwhelming market dominance in the MSAs for which it seeks forbearance.”⁶

Many commenters also focused particularly on the consumer harms that would result if the Qwest Petitions are granted. For instance, the Washington State Public Counsel pointed out that “in the absence of cost-based UNEs, the current level of competition is not

⁴ Comments of Comcast Corporation, WC Docket No. 07-97, at 7 (filed Aug. 31, 2007) (“*Comcast Comments*”) (footnotes omitted); *See also* Opposition of Affinity Telecom, Inc., et al., WC Docket No. 07-97, at 3 (filed Aug. 31, 2007) (“*Affinity, et al. Opposition*”) (“Qwest has omitted essential information on wire center level ‘coverage’ by independent facilities-based providers that the Commission has said is the only basis for Section 251(c)(3) forbearance.”).

⁵ *See, e.g.*, Comments of Cox Communications, Inc., WC Docket No. 07-97, at 15-18 (filed Aug. 31, 2007) (“*Cox Comments*”); Comments of BT Americas Inc., WC Docket No. 07-97, at 9-10 (filed Aug. 31, 2007) (“*BT Americas Comments*”); *Comcast Comments*, at 4-7; Comments of the Public Counsel Section of the Washington State Attorney General’s Office, et al., WC Docket No. 07-97, at 4-6, 11 (filed Aug. 31, 2007) (“*Washington State Public Counsel Comments*”); Comments of the Colorado Public Utilities Commission, WC Docket No. 07-97, at 19 (filed Aug. 31, 2007) (“*Colorado PUC Comments*”); Comments of COMPTel, WC Docket No. 07-97, at 31-32 (filed Aug. 31, 2007) (“*COMPTel Comments*”).

⁶ Comments of the Ad Hoc Telecommunications Users Committee, WC Docket No. 07-97, at 3 (filed Aug. 31, 2007) (“*Ad Hoc Comments*”).

sufficient to discipline Qwest's market power and constrain it from charging supra-competitive prices" and that "a grant of the requested relief . . . [therefore] would not be in the public interest."⁷ The Washington State Public Counsel and others highlighted that the "last mile" deregulation sought in the Petitions would jeopardize access to basic telecommunications services by all, resulting in significant public interest harm.⁸ The Colorado Public Utilities Commission and others cautioned that unless regulation remains in place, "tacit collusion and joint market dominance likely will occur"⁹ between Qwest and the cable company and that "[t]he tight duopoly which would develop if forbearance is granted will not provide the benefits of competition contemplated by the 1996 Act and in economic literature."¹⁰

The comments show that the MSAs for which Qwest seeks forbearance are significantly different from Omaha and Anchorage in size, scope, demographics, and competitive characteristics and that the "predictive judgments" utilized in the Omaha and Anchorage proceedings will not suffice to protect consumers and justify forbearance in these significantly differing markets.¹¹ This is particularly true when considering the cumulative effect that a grant

⁷ *Washington State Public Counsel Comments*, at 2.

⁸ *See, e.g.*, Comments of the Colorado Office of Consumer Counsel, WC Docket No. 07-97, at 10 (filed Aug. 31, 2007) ("*Colorado Consumer Counsel Comments*"); Comments of the National Association of State Utility Consumer Advocates, WC Docket No. 07-97, at 2-3 (filed Aug. 31, 2007) ("*NASUCA Comments*").

⁹ *Colorado PUC Comments*, at 31.

¹⁰ *Id.*, at 13.

¹¹ *See, e.g.*, EarthLink, Inc. and New Edge Network, Inc. Opposition, WC Docket No. 07-97, at 2 (filed Aug. 31, 2007) ("*EarthLink Opposition*") ("Given the unprecedented scope of Qwest's petitions, the potential for harm here cannot be overestimated. Taken together, these petitions threaten the competitive landscape for nearly 13 million Americans, in over four and a half million households. And, unlike the relatively small territories at issue in the *Omaha* and *Anchorage* forbearance proceedings, Qwest's petitions cover a massive geographic area . . .") (emphasis in original). Moreover, as discussed in more detail in Section III, *infra*, time is clearly revealing that the Commission's determination in Omaha was misguided and that competition and consumers have suffered from Qwest's deregulation. *See, e.g.*, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan*

of all or part of the four Qwest Petitions would have on competition and consumers throughout the Qwest local operating region.¹² In short, the comments effectively catalogue the myriad procedural and substantive defects that pervade the Qwest Petitions and demand that they be rejected by the Commission.

II. THE DATA PROVIDED BY QWEST IS INSUFFICIENT TO MEET ITS BURDEN OF PROOF

In the recent *Qwest Omaha* opinion, the D.C. Circuit affirmed the Commission's finding in the *Omaha Forbearance Order*¹³ that individual wire centers are the appropriate geographic market in which to begin consideration of whether forbearance from Section 251(c) unbundling obligations is warranted.¹⁴ Accordingly, Qwest should be required to provide (and already should have provided) the Commission (and interested parties) detailed data showing the nature and extent of competitive activity in each wire center in each subject MSA. The petitioning party has the burden of proof to bring forth this data and, if it fails to do so, its petition must be denied.¹⁵

Statistical Area, Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Docket No. 04-223 (filed Jul. 23, 2007) (“*McLeodUSA Petition*”).

¹² See, e.g., *EarthLink Opposition*, at 2-3.

¹³ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) (“*Omaha Forbearance Order*”), *aff'd Qwest Corporation v. Federal Communications Commission*, Case No. 05-1450, (D.C. Cir. Mar. 23, 2007) (“*Qwest Omaha*”).

¹⁴ *Qwest Omaha*, Slip Op. at 14-16.

¹⁵ See *Omaha Forbearance Order*, ¶¶ 61-62; see also Comments of Covad Communications Group, NuVox Communications, and XO Communications, LLC, WC Docket No. 07-97, at 17 (filed Aug. 31, 2007) (“*Covad, et al. Comments*”); *Affinity, et al. Opposition*, at 16-17.

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Numerous commenters noted that Qwest has failed to present appropriate wire center-specific information.¹⁶ Qwest instead has made various general allegations regarding the level of competition in the four MSAs at issue. For example, as explained in the Opposition of EarthLink and New Edge Network, “[w]hile Qwest’s Petitions and supporting declarations contain statements for each MSA such as ‘[the cable company is] serving a geographic area within the [] MSA encompassing Qwest wire centers that account for over X% of the Qwest retail residential market and Y% of the Qwest retail business lines in the [] MSA,’ these statements simply serve to mask the actual degree of facilities-based competition. There is no way to tell from these statements whether the cable company reaches 90 percent or .9 percent of the homes in those wire centers within the MSA.”¹⁷

Qwest makes the sweeping assertion that competition in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle MSAs is more advanced than it was in Omaha,¹⁸ but this assertion is not supported by any real data. For example, as pointed out by the Colorado Consumer Counsel, the large geographic areas covered by the Denver MSA contain substantial topographical and density variations and are not subject to uniform levels of competitive entry, yet Qwest has not provided any data that takes those variations into account.¹⁹ The same type of

¹⁶ See, e.g., *Cox Comments*, at 6, 17; *Comcast Comments*, at 7; *Colorado PUC Comments*, at 19; *EarthLink Opposition*, at 47; *Affinity, et al. Opposition*, at 16; *Opposition of Time Warner Telecom, et al.*, WC Docket No. 07-97, at 7 (filed Aug. 31, 2007) (“*Time Warner Telecom Opposition*”).

¹⁷ *EarthLink Opposition*, at 48.

¹⁸ See Qwest Petition – Denver, at 1; Qwest Petition – Minneapolis-St. Paul, at 1; Qwest Petition – Phoenix, at 1; Qwest Petition – Seattle, at 1.

¹⁹ *Colorado Consumer Counsel Comments*, at 10 (“The Denver Metro survey by Ciruli Associates would tend to overstate competition . . . because the survey *includes* the much more populated (and densely populated) county of Boulder – and thus, a more competitive county for telecommunications – and *excludes* the less populated (and less densely populated) counties of Polk, Clear Creek, Gilpin and Elbert which are included in the Denver-Aurora MSA and which would have a dilutive effect on the analysis of the overall competition in the MSA.”) (emphasis in original).

“internally inconsistent, unexplained, [and] incomplete”²⁰ data presented by Qwest was rejected by the Commission in the *Omaha Forbearance Order*, and the Commission also should reject it here.

The limited “evidence” actually presented by Qwest is rife with flaws, as identified by numerous commenters. First, and most fundamentally, the limited data proffered by Qwest does not differentiate between competition from carriers using wholesale inputs obtained from Qwest, such as unbundled loops and transport, and competition from carriers using their own facilities, including last mile facilities.²¹ Qwest should be well aware, however, that the starting point for the Commission’s forbearance analysis under the *Omaha Forbearance Order* framework requires the party petitioning for forbearance from Section 251(c)(3) unbundling obligations to show for each product market that competitive carriers have constructed competing last-mile facilities in a wire center and that each of these competitive carriers is willing and able to use its facilities, including its own loop facilities, within a commercially reasonable period of time to serve 75% of the end user locations in a wire center.²²

The Commission has defined a facilities-based competitor for purposes of its Section 251(c)(3) forbearance analysis as a carrier that can successfully provide local exchange and exchange access services without relying on the incumbent local exchange carrier’s (“ILEC’s”) loops or transport.²³ Indeed, as stated by EarthLink, “any competitive pressure on Qwest from such UNE-based carriers demonstrates not that forbearance is warranted, but that the availability of section 251 pricing is necessary to achieve just and reasonable rates, to protect

²⁰ *Affinity, et al. Opposition*, at 13.

²¹ *See, e.g., Cox Comments*, at 10, 18; *Comcast Comments*, at 5; *EarthLink Opposition*, at 49-50; *Affinity, et al. Opposition*, at 10-12; *Colorado PUC Comments*, at 28; *Time Warner Telecom Opposition*, at 9-10.

²² *See Omaha Forbearance Order*, at n. 156, ¶ 69.

²³ *See, id.*, at ¶ 64.

consumers, and to promote the competition that is key for the public interest.”²⁴ The absence of any data that permits an analysis of the extent to which competitors actually reach, or “cover,” residences or businesses in each wire center within an MSA with their own facilities (including last-mile facilities) therefore compels the conclusion that Qwest has not met its minimum burden of proof in any geographic area to establish that sufficient competition exists to warrant forbearance.

Second, as pointed out by Cox, Qwest engages in “double-counting” in its estimates of competitive lines in service. Qwest presents estimates of competitive local exchange carrier “(CLEC”) mass market lines in service based on white-pages listings to support its contention that there is robust competition from wireline CLECs in the four MSAs at issue.²⁵ Cox’s analysis of Qwest’s estimates revealed, however, that “more than [**confidential** ****] of that figure comes from competition provided by Cox, to which Qwest dedicates a separate portion of the Phoenix Petition. Qwest’s presentation appears to show a traditional wireline competitive LEC penetration that is [**confidential** ****] the level supported by Qwest’s data.”²⁶ According to Cox, “Qwest’s presentation of enterprise market statistics for competitive LECs suffers from the same faults.”²⁷ Indeed, Qwest’s estimates of enterprise lines are “far less reliable” than its estimates of mass market lines.²⁸ Moreover, Cox notes that Qwest cites competitive LEC competition from AT&T and Verizon, “though both of those companies have disavowed any intention to continue developing their residential LEC businesses” and points out

²⁴ *EarthLink Opposition*, at 50.

²⁵ *Cox Comments*, at 19-20.

²⁶ *Id.* (footnote omitted).

²⁷ *Id.* at 20.

²⁸ *Id.* (“Qwest estimates [**confidential** ****] business lines based on only about [**confidential** ****] competitive LEC while pages listings.”).

that it would be “incongruous” if the Commission were to grant forbearance based on the competitive threat posed by companies with no intention to continue competing.²⁹ Cox concludes that the Commission should “entirely disregard” Qwest’s “speculative and disingenuously presented” data.³⁰

Third, Qwest’s data regarding switched access line loss is flawed and misleading. Qwest suggests that to the extent a competitor drops a Qwest line, the customer is being served by a competitor.³¹ In fact, as pointed out by numerous commenters, a decline in Qwest’s number of access lines proves nothing regarding the extent of competition in the local exchange market.³² As the Commission found in the *Anchorage Forbearance Order*, “abandonment of a residential access line does not necessarily indicate capture by a competitor.”³³ Some portion of the reported line loss unquestionably reflects consumers who have converted a second line used for dial-up Internet access to a broadband line. And, as noted by Ad Hoc, “a large share [of the high-speed Internet access lines that replaced second lines] went to Qwest itself.”³⁴

Further, as noted by Cox, Qwest “fails to acknowledge that the overall telecommunications pie in Phoenix and nationwide has grown tremendously” and that, at most, Qwest’s access line decline “merely shows that it has not dominated new market segments” and not “that Qwest’s domination of its traditional market segment – which Section 251 is designed

²⁹ *Id.*, at 19 (footnote omitted).

³⁰ *Id.*, at 20.

³¹ Qwest Petition – Denver, at 17-18; Qwest Petition – Minneapolis-St. Paul, at 18-19; Qwest Petition – Phoenix, at 17-18; Qwest Petition – Seattle, at 17-18.

³² See, e.g., *Cox Comments*, at 11-12; *Ad Hoc Comments*, at 5.

³³ *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, As Amended, for Forbearance From Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 1958, at n. 88 (2007) (“*Anchorage Forbearance Order*”).

³⁴ *Ad Hoc Comments*, at 5 (emphasis in original).

to ameliorate – has declined substantially.”³⁵ Moreover, Affinity, et al. pointed out that Qwest’s line loss information does not show the extent to which “lost” retail lines are served by competitors using Qwest facilities. According to Affinity, et al., “[b]ecause Qwest has not provided the number of retail lines lost to providers that continue to be dependent on Qwest facilities, its statements of retail line losses do not show independent facilities-based competition.”³⁶

Although Qwest no doubt possesses information that could provide some context for the line loss figures it has offered, Qwest has chosen not to provide that information. In the absence of any supporting documentation, the Commission cannot reasonably conclude that Qwest’s claim that line losses “prove” the existence of competition in the MSAs at issue. The only conclusion the Commission can draw from Qwest’s approach is that this additional information would demonstrate that line loss is not having a significant impact on Qwest. Accordingly, the Commission should not rely on the line loss data as a basis for granting any regulatory relief to Qwest.

III. QWEST HAS NOT ESTABLISHED THAT SUFFICIENT COMPETITION EXISTS WITHIN EACH RELEVANT MARKET TO WARRANT FORBEARANCE FROM STATUTORY UNBUNDLING REQUIREMENTS

To support its Petitions, Qwest offers the names of numerous cable-based, Voice over Internet Protocol (“VoIP”), wireless, and CLEC providers purportedly offering competing services in the MSAs at issue.³⁷ However, as discussed below, various commenters showed that

³⁵ *Cox Comments*, at 12 (footnote omitted).

³⁶ *Affinity et al. Opposition*, at 20.

³⁷ *See, e.g.*, Qwest Petition – Denver, Declaration of Robert H. Brigham and David L. Teitzel Regarding the Status of Telecommunications Competition in the Denver, Colorado Metropolitan Statistical Area, at 10-29 (“*Brigham/Teitzel Declaration – Denver*”); Qwest Petition – Minneapolis-St. Paul, Declaration of Robert H. Brigham and David L. Teitzel Regarding the Status of Telecommunications Competition in the Minneapolis-St. Paul, Minnesota Metropolitan Statistical Area, at 11-49

Qwest has utterly failed to prove that facilities-based competition from any of these sources is sufficient to justify forbearance in any wire center in any of the four MSAs for which Qwest has sought regulatory relief.

Moreover, numerous commenters cautioned that the Commission cannot rely on its “predictive judgment” that the limited competition that does exist today in the four MSAs at issue – the bulk of which is dependent on continued access to Qwest’s wholesale facilities and services – will survive if Qwest is granted forbearance from its Section 251(c)(3) obligation to make loops and transport available at cost-based (*i.e.*, TELRIC) rates.³⁸ In the *Omaha Forbearance Order*, the Commission relied on its “predictive judgment” that Qwest would offer wholesale access to dedicated facilities on reasonable terms and conditions once released from the legal mandate of Section 251(c)(3).³⁹ Unfortunately, the Commission’s predictive judgment in the *Omaha Forbearance Order* turned out to be incorrect.

As shown in the Affinity, et al. Opposition, “since the Commission lifted Qwest’s Section 251(c)(3) unbundling obligations in the Omaha MSA, Qwest has proposed uneconomical, onerous, and non-negotiable offerings to replace the Section 251(c)(3) network elements for the affected wire centers.”⁴⁰ As a result, “the most impacted CLEC in the Omaha market, McLeodUSA Telecommunications Services, Inc. (‘McLeodUSA’)” has informed the

(“*Brigham/Teitzel Declaration – Minneapolis-St. Paul*”); Qwest Petition – Phoenix, Declaration of Robert H. Brigham and David L. Teitzel Regarding the Status of Telecommunications Competition in the Phoenix, Arizona Metropolitan Statistical Area, at 10-36 (“*Brigham/Teitzel Declaration – Phoenix*”); Qwest Petition – Seattle, Declaration of Robert H. Brigham and David L. Teitzel Regarding the Status of Telecommunications Competition in the Seattle, Washington Metropolitan Statistical Area, at 10-45 (“*Brigham/Teitzel Declaration – Seattle*”).

³⁸ See, e.g., *COMPTEL Comments*, at 18-19; *Affinity, et al. Opposition*, at 46-52; *Time Warner Telecom Opposition*, at 41-43.

³⁹ *Omaha Forbearance Order*, at ¶ 67.

⁴⁰ *Affinity, et al. Opposition*, at 47.

Commission that the forbearance granted to Qwest in the Omaha market has made it “extremely difficult for it to remain viable in the market and has severely devalued the investment in its network facilities.”⁴¹ McLeodUSA has publicly announced that it will discontinue its operations in the Omaha MSA if the Commission does not modify the *Omaha Forbearance Order*.⁴² Moreover, as a direct result of Qwest’s post-forbearance market behavior in the Omaha MSA, Integra Telecom, Inc. recently explained that it has abandoned plans to enter the Omaha market.⁴³

Given this sobering experience in the Omaha MSA, there is absolutely no basis for a “predictive judgment” that CLECs would be able to obtain commercially-viable wholesale access to Qwest’s loops and transport in a post-forbearance environment in the Denver, Minneapolis-St. Paul, Phoenix, or Seattle MSA. In the words of Time Warner Telecom, “[i]f Qwest’s instant forbearance requests were granted, the experience of intermodal competitors in the four MSAs at issue will not be different from that of McLeodUSA and Integra in the Omaha MSA.”⁴⁴ The Commission must avoid the devastating error made in the *Omaha Forbearance Order* and refrain from relying on “the faulty premise that in the absence of the statutory mandate, Qwest will offer competitive wholesale pricing to competitors.”⁴⁵ It is particularly critical that the Commission avoid the mistake it made in the Omaha proceeding since its determination in this proceeding could affect 13 million individuals and businesses in four major markets.⁴⁶

⁴¹ *Id.*

⁴² *See McLeodUSA Petition*, at 14.

⁴³ *Time Warner Telecom Opposition*, at 42, *quoting McLeodUSA Petition*, at 18.

⁴⁴ *Id.*, at 43.

⁴⁵ *COMPTEL Opposition*, at 18.

⁴⁶ In contrast, the Omaha-Council Bluffs MSA has a population of approximately 820,000.

A. Cable Competition

Qwest’s principal foundational basis for forbearance in each Petition is the presence of cable competitors in the relevant MSA. In the words of the Colorado Consumer Counsel, for instance, “Comcast is the peg upon which Qwest is primarily placing its hat for approval of [the] Denver MSA Petition.”⁴⁷ Although Qwest has offered no data regarding cable provider coverage or penetration for voice services on a wire-center-by-wire-center basis, it generally contends that cable-based competition is sufficiently robust to justify forbearance throughout the four MSAs at issue.⁴⁸ It is telling that the cable companies actually operating in the MSAs for which Qwest is seeking forbearance have clearly and unequivocally informed the Commission that Qwest has grossly overstated cable competition in the voice market and that forbearance from Section 251(c) unbundling requirements is not warranted.⁴⁹

Data submitted by the cable companies proves that Qwest has “grossly exaggerated”⁵⁰ the presence of cable operators in both the mass market and the enterprise market. With respect to the mass market, Comcast reported that “in *none* of its CDV [Comcast Digital Voice] markets, including Minneapolis-St. Paul, has [it] yet achieved a penetration rate of

⁴⁷ See *Colorado Consumer Counsel Comments*, at 21. See also *Cox Comments*, at 2 (“competition from Cox is the chief basis for the Phoenix Petition.”). Moreover, as noted in Cox’s comments, “Cox is the only competitor for which Qwest even seeks to provide any of the type of facilities deployment data the Commission requires for analysis of Section 251 forbearance.” *Id.*, at 21.

⁴⁸ See, e.g., Qwest Petition – Denver, at 6 (“The most prevalent source of competition in the Denver MSA is Comcast”) See also Qwest Petition – Minneapolis-St. Paul, at 6; Qwest Petition – Phoenix, at 6; Qwest Petition – Seattle, at 6.

⁴⁹ See, e.g., *Cox Comments* at 6 (“Qwest has not carried its burden under Section 10 and the Commission precedent for forbearance from the incumbent LEC regulations identified in the Phoenix Petition.”); *Comcast Comments*, at 4 (“Comcast submits these brief comments to correct certain errors in Qwest’s Petition. These factual errors overstate the level of competition that Qwest faces from Comcast.”).

⁵⁰ *Comcast Comments*, at 6.

even [**Redacted**] % of homes passed, let alone the levels in the *Omaha Order*.”⁵¹ Comcast further noted that because it “generally does not pass as many homes in an MSA as the ILEC, [its] market share would actually be less than this aspirational penetration rate.”⁵²

Cox focused on the limited extent of its service footprint to show that Qwest has also overstated its presence in the mass market for telephony services. Cox, which operates in the Phoenix MSA, indicated that it is not franchised to provide cable services in the entire Phoenix MSA.⁵³ Further, Cox stated that it does not provide telephone service throughout the entire MSA.⁵⁴ Cox questioned Qwest’s failure to identify in which of its wire centers Cox has deployed facilities, since Qwest “purports to rely on an online coverage map published by Cox to illustrate its facilities deployment in the Phoenix MSA.”⁵⁵

Further, the Colorado Consumer Counsel has provided empirical evidence that Qwest has wildly overstated the level of cable penetration in the residential market. The results of a 2006 study commissioned by the Colorado Consumer Counsel showed that “only 6.2% of residential households surveyed in the Denver Metro Area had Comcast as their local service provider. Qwest’s percentage was 85.1% -- almost 14 times as much as Comcast’s share.”⁵⁶ Moreover, the Colorado Consumer Counsel noted that this 6.2% market share likely will decrease over time because one of Comcast’s residential products is being discontinued.⁵⁷ In August 2007, Comcast filed applications before the Colorado PUC and this Commission for

⁵¹ *Comcast Comments*, at 5.

⁵² *Id.*

⁵³ *Cox Comments*, at 21.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Colorado Consumer Counsel Comments*, at 22.

⁵⁷ *Id.*

discontinuance of its traditional landline business. In its application to the Colorado PUC, Comcast stated that its expectation is that attrition will diminish the number of its Colorado residential customer lines.⁵⁸ And “given that Qwest is, by far, the best known local carrier with the largest market share, it is a safe and non-rebuttable presumption that a simple majority – if not more – of these customers will end up at Qwest.”⁵⁹

The data for the enterprise market also unequivocally shows that Qwest has “grossly exaggerated”⁶⁰ cable operators’ success in and their ability to serve the enterprise market. Qwest relies heavily on the contention that the cable operators in the four MSAs at issue have network facilities in place throughout each MSA that they can use to serve all enterprise customers.⁶¹ The underlying premise of Qwest’s argument – that a cable network that passes a particular area is capable of providing telephone service to all enterprise customers in that area—does not accurately reflect the reality of the marketplace however. The Colorado PUC points out that “Comcast would need to expand its distribution network to connect to commercial locations; it is possible that some Qwest business customers would not be reached with cable telephony for a long time, if ever.”⁶²

Indeed, Comcast itself stated that it “has not, to date, made any significant or sustained entry into the business market and enterprise markets.”⁶³ Comcast stated further that “business customers have not been a focus of [its] sales and marketing efforts until very recently

⁵⁸ *Id.*, at 23, quoting Comcast Application for Discontinuance, Docket No. 07A-301T, Colorado Public Utilities Commission (filed Aug. 10, 2007).

⁵⁹ *Id.*

⁶⁰ *Comcast Comments*, at 6.

⁶¹ See Qwest Petition – Denver, at 21-22; Qwest Petition – Minneapolis-St. Paul, at 22-23; Qwest Petition – Phoenix, at 21-23; Qwest Petition – Seattle, at 21-22.

⁶² *Colorado PUC Comments*, at 22.

⁶³ *Comcast Comments*, at 6.

and [it] is only now beginning to build the infrastructure necessary to serve these customers.”⁶⁴

Comcast added that it currently serves fewer than [] enterprise customers in the Seattle, Minneapolis-St. Paul and Denver markets combined.⁶⁵

Moreover, the Colorado Consumer Counsel made the important point that the service packages made available by cable companies may not be attractive or affordable to many consumers.⁶⁶ The Colorado Consumer Counsel noted that “local service with only a few calling features,” and “local with toll calling and no features” are not offered by Comcast through its CDV platform.⁶⁷ The Colorado Consumer Counsel survey found that “the majority of residential and business consumers in the Denver Metro Area [do] not want this whole package of local, long-distance and the ‘popular calling features,’ and bridle against this type of singular service offering.”⁶⁸ Importantly, in addition, Comcast’s offering “would not be an affordable choice for the majority of Denver Metro mass market consumers and would, accordingly, be a further constraining factor on the competitive threat posed to Qwest.”⁶⁹

In short, there is no record basis to conclude (for the residential or enterprise market) that cable-based competition is sufficiently widespread or robust such that continued enforcement of Section 251(c)(3) is unnecessary to ensure Qwest’s rates and terms are just and reasonable and not unreasonably discriminatory.

⁶⁴ *Id.*

⁶⁵ *Id.*, at 6.

⁶⁶ *Colorado Consumer Counsel Comments*, at 24-28.

⁶⁷ *Id.*, at 24.

⁶⁸ *Id.* (emphasis in original).

⁶⁹ *Id.*, at 24-25. The Colorado Consumer Counsel pointed out that “Comcast is much more expensive than is Qwest’s stand-alone residential or business offering.” *Id.*, at 26.

B. Over-the-Top VoIP Competition

In addition to cable, Qwest also points to over-the-top VoIP services in its attempt to demonstrate sufficient competition to warrant forbearance in the mass market, citing forecasts of “exponential VoIP growth through at least 2010.”⁷⁰ Many commenters compellingly demonstrated that over-the-top VoIP services are simply not a source of facilities-based competition, because, by definition, they ride the facilities of another provider, which in many cases is Qwest itself.⁷¹ Further, because VoIP requires an underlying broadband platform, “the current economies of the service often do not effectively meet the needs of large segments of the market.” Like the services provided by cable operators, the costs associated with the broadband connection required to access VoIP services limits the ability of many mass market consumers to take advantage of this alternative service and limits its competitive effect, particularly among low income individual and families.

Additionally, for many mass market consumers, VoIP service is still not an acceptable substitute for traditional landline service. In the Colorado Consumer Counsel survey referenced in the prior section, “only 18% of respondents agreed (either strongly or somewhat) that they preferred VoIP instead of traditional landline telephone service and 49.5% of respondents disagreed (either strongly or somewhat) which signaled their preference for traditional phone service.”⁷² As the Colorado PUC pointed out, “there may be consumer

⁷⁰ See, e.g., Qwest Petition - Denver, at 14. See also Qwest Petition – Minneapolis-St. Paul, at 15; Qwest Petition – Phoenix, at 14; Qwest Petition – Seattle, at 14. Qwest does not even attempt to rely on VoIP services to demonstrate competition in the enterprise market.

⁷¹ See, e.g., Comments of the Voice on the Net (“VON”) Coalition, WC Docket No. 07-97, at 2-3 (filed Aug. 31, 2007) (“VON Coalition Comments”). See also Comments of BT Americas, at 11; Washington State Public Counsel Comments, at 10; Initial Comments of the Arizona Corporation Commission, WC Docket No. 07-97, at 9 (filed Aug. 31, 2007) (“Arizona Commission Comments”).

⁷² Id., at 27.

reluctance to accepting VoIP as a perfect substitute for traditional telephony as VoIP requires additional customer premises equipment in order to translate IP transmission into voice communication.”⁷³

Moreover, the VON Coalition cautioned the Commission against relying on “speculative (and outdated) analyst estimations” to predict intermodal competition from over-the-top VoIP sources.⁷⁴ The VON Coalition urged the Commission to instead look to recent developments such as the market withdrawal of Sunrocket, the second largest independent over-the-top VoIP provider in the United States, and Verizon’s “vigorous efforts to eliminate future over-the-top VoIP competition via patent infringement while, at the same time, claiming over-the-top VoIP competition warrants forbearance.”⁷⁵ These concerns were echoed in the comments of the Washington State Public Counsel, which noted that “significant question remains about whether VoIP providers will be able to survive.”⁷⁶

The VON Coalition also argued that over-the-top VoIP competition should not be included in the Commission’s Section 251(c)(3) forbearance analysis because “grant of Section 251(c)(3) forbearance would likely have a detrimental impact on VoIP competition due to the simple reduction in broadband Internet access alternatives that would likely occur in each of the affected markets.”⁷⁷ The VON Coalition urged the Commission to adopt policies that will “ensure that VoIP and broadband competition can flourish” rather than including VoIP in its

⁷³ *Colorado PUC Comments*, at 21-22.

⁷⁴ *VON Coalition Comments*, at 3.

⁷⁵ *Id.*

⁷⁶ *Washington State Public Counsel Comments*, at 10.

⁷⁷ *VON Coalition Comments*, at 5.

Section 251(c)(3) forbearance analysis, which could (if forbearance is granted) have a deleterious impact on the future of VoIP services.⁷⁸

In sum, the comments provided absolutely no support for Qwest’s attempt to include over-the-top VoIP services in the Commission’s forbearance analysis. Thus, the Commission should maintain the approach adopted in the *Omaha Forbearance Order* and exclude VoIP services from its deliberations.

C. Competitive Wholesale Service Offerings

Several commenters undercut Qwest’s weak attempt to justify forbearance on the basis of wholesale alternatives to the use of its Section 251(c)(3) network elements⁷⁹ by detailing the lack of viable wholesale alternatives to Qwest’s services and facilities to serve mass market and enterprise customers. Ad Hoc described the direct market experience of its large user members and stated that although “it is often suggested that the level of competition in the enterprise market is greater than that for mass market services, the reality is that the vast majority of businesses – large and small – are being served either directly or indirectly using ILEC facilities only because they are the only alternative available.”⁸⁰ Dr. Selwyn, in a declaration supporting Ad Hoc’s comments, cited recent statements by Level3 regarding its plans for building out fiber in commercial buildings to illustrate “[t]he difficulties confronting CLECs in presenting ILECs such as Qwest with a serious competitive challenge” in the wholesale market.⁸¹ Dr. Selwyn stated:

⁷⁸ *Id.*, at 6.

⁷⁹ See Qwest Petition – Denver, at 16-17, 26-27; Qwest Petition – Minneapolis-St. Paul, at 17, 26-27; Qwest Petition – Phoenix, at 16, 26-27; Qwest Petition – Seattle, at 16-17, 26.

⁸⁰ *Ad Hoc Comments*, at 10-11.

⁸¹ *Ad Hoc Comments*, Declaration of Lee L. Selwyn, at ¶ 31 (“*Selwyn Declaration*”) (footnote omitted, emphasis in original).

According to Level3, there are 100,000 “enterprise buildings” within 500 feet of its metro fiber in the US, and the company states that it is “targeting 750 to 1,000 building additions in 2007.” At that rate of deployment, it would take between *100 and 140 years* for Level3 to “light” all of those 100,000 buildings, underscoring just how formidable the entry barriers confronting even the largest CLECs actually are.⁸²

BT Americas cited a late-2006 Government Accountability Office (“GAO”) report which showed that, in three of the four MSAs for which Qwest is seeking forbearance, competitors were serving less than the national average of 6% of the buildings with demand for dedicated access.⁸³ Minneapolis had 5.7% of buildings with a competitive alternative, and competition was appreciably lower in Phoenix and Seattle (at 3.7% and 3.8%, respectively.)⁸⁴ According to BT Americas, “the GAO found that the limited competitive build-out in these cities was due to ‘a variety of entry barriers, including government zoning restrictions and the difficulty gaining access to buildings from building owners.’”⁸⁵

Consistent with the evidence presented by Ad Hoc, BT Americas and other commenters, the Arizona Corporation Commission informed the Commission that although there are several CLECs with a “significant presence in the Arizona business marketplace . . . these carriers are dependent upon Qwest’s wholesale network elements.”⁸⁶ The Washington State Public Counsel noted that “the Washington Utilities and Transportation Commission (WUTC) has recognized the level of CLEC dependence on the use of Qwest facilities each time the

⁸² *Id.*

⁸³ *BT Americas Comments*, at 6.

⁸⁴ *Id.*

⁸⁵ *Id.* (footnote omitted).

⁸⁶ *Arizona Corporation Commission Comments*, at 12.

agency has investigated the state of competition in the Qwest service territory.”⁸⁷ And the Colorado PUC added that although “Qwest is currently obligated to provide leased access to its facilities . . . Comcast is under no similar obligation to provide leased services to CLECs that request the services. Comcast is not, in practice, offering wholesale access to its network to CLECs as an alternative to Qwest.”⁸⁸ The Colorado PUC concluded that “[t]he absence of competitive alternatives to CLECs for these vital service inputs and CLECs’ logical reluctance to make uneconomic investments should be central in the Commission’s forbearance analysis.”⁸⁹

Several commenters described the shortcomings of the fiber route maps filed by Qwest which purported to show the location of CLEC-owned fiber.⁹⁰ As summarized by Cox:

To rely on these “competitive fiber networks,” Qwest must show that these networks actually are providing services that compete with Qwest’s mass market and enterprise service offerings. Qwest, however, provides no specific information about any of these alleged competitors or their fiber networks. Qwest provides no evidence of whether this fiber is lit or dark, of whether it is made available to third parties, or even of its capacity . . . Consequently, Qwest’s assertion . . . is useless in determining how many customers in any . . . wire centers actually could use that fiber to fulfill their telecommunications needs.⁹¹

The Joint Commenters agree that “the maps are so lacking in detail that they have no probative value.”⁹²

In short, the comments provided no support whatsoever for Qwest’s contention that viable wholesale alternatives to use of Qwest’s UNE loops and transport exist in any of the

⁸⁷ *Washington State Public Counsel Comments*, at 3.

⁸⁸ *Colorado PUC Comments*, at 11.

⁸⁹ *Id.*

⁹⁰ *See, e.g., Ad Hoc Comments*, at 7-8; *Cox Comments*, at 16-18.

⁹¹ *Cox Comments*, at 17.

⁹² *Ad Hoc Comments*, at 7.